SUPREME COURT OF THE UNITED STATES.

No. 371.

JACOB TOME, THOMAS M. ABBOTT, AND DANIEL SHURE, PLAINTIFFS IN ERROR,

vs.

JOHN DU BOIS AND ELIAS S. LOWE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

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1 THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

At a circuit court of the United States for the fourth circuit, in and for the Maryland district, begun and held at the city of Baltimore, on the first Monday of November, in the year of our Lord one thousand eight hundred and sixty-five.

Present, the honorable S. F. Chase, Chief Justice of the Supreme Court of the United States; F. Giles, judge of Maryland district; William J. Jones, esquire, attorney; Washington Bonifant, esquire, marshal; James W. Chew, clerk.

Among others were the following proceedings, to wit:

JOHN DU BOIS and ELIAS S. LOWE
vs.
JACOB TOME, THOMAS M. ABBOTT, and DANIEL Shure.

Be it remembered that heretofore, to wit, on the 24th day of November, in the year of our Lord one thousand eight hundred and sixty-two, the said John Du Bois and Elias S. Lowe, by James Mason Campbell and Luther M. Reynolds, esquires, their attorneys, prosecuted and sued forth out of the circuit court here the writ of the United States of America, of summons to the marshal of the Maryland district aforesaid, directed in the words and of the tenor following, to wit:

2 THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

To the marshal for the Maryland district, greeting:

We command you that you summon Jacob Lowe, Thomas M. Abbott, and Daniel Shure, copartners, trading in the name and firm of Tome, Shure & Company, citizens of the State of Maryland; that, all excuses and delays set aside, they be and appear before the judges of the circuit court of the United States for the fourth circuit in and for the Maryland district, to be held at the city of Baltimore, on the first Monday in April next, to answer unto John Du Bois and Elias S. Lowe, copartners, trading in the name and firm of Du Bois and Lowe, citizens of the commonwealth of Pennsylvania, on a plea of trespass on the case, &c. Hereof you are not to fail, at your peril, and have you then and there this writ.

Witness the honorable R. B. Taney, Chief Justice of our Supreme Court, the first Monday in December, in the year of our Lord one thousand eight hundrd and sixty-one.

Issued 24 Nov., 1862.

[SEAL.] THO'S SPICER, *Cl'k Circ't C't.*

J. M. C. and L. M. R.

And the said John Du Bois and Elias S. Lowe, by their attorneys aforesaid, on the day of prosecuting and suing forth the foregoing writ, declared against the said Jacob Tome, Thomas M. Abbott, and Daniel Shure, in the plea aforesaid, in form following, to wit:

3 In the circuit court of the United States in and for the district of Maryland.

John Du Bois and Elias S. Lowe, copartners, trading in the name and firm of Du Bois & Low, citizens of the commonwealth of Pennsylvania, complain of Jacob Tome, Thomas M. Abbott, and Daniel Shure, copartners, trading in the name and firm of Tome, Shure & Company, citizens of the State of Maryland, in a plea of trespass in the case. For that the said plaintiffs heretofore, to wit, on the 1st day of August, 1861, in the county of Harford, and in Cecil county, in the said State of Maryland, lawfully possessed as of their own property of ten thousand white-pine saw-logs, and of four hundred thousand feet of white-pine plank, and of four hundred thousand feet of white-pine logs; and being so possessed the said plaintiffs afterwards, to wit, on the day and year aforesaid, in Harford county, and in Cecil county afores'd, casually lost the said white-pine saw-logs, white-pine plank, and white-pine logs, and the same afterwards, to wit, on the day and year aforesaid, in the counties aforesaid, came into the possession of the defendants by finding; yet the said defendants, well knowing the said white-pine saw-logs, white-pine plank, and white-pine logs to be the property of the said plaintiffs, and of right to belong to them, craftily intending to deceive and defraud the said plaintiffs in this behalf, have not as yet delivered the said white-pine saw-logs, white-pine plank, and white-pine logs, or any part thereof, to the plaintiffs, although often requested so to do, and hath
4 hitherto wholly refused so to do, and afterwards, to wit, on the day and year aforesaid, in the counties aforesaid, converted and disposed of the said white-pine saw-logs, white-pine plank, and white-pine logs to their own use, to the damage of the said plaintiffs of twenty thousand dollars, and therefore they bring their suit.

J. MASON CAMPBELL & L. M. REYNOLDS,
Pl'ff's Attorneys.

A copy of which said declaration was made and sent with the said writ to the marshal of the district aforesaid, thereon indorsed, to be served on the def'ts.

At which mentioned first Monday in April, in the year of our Lord 1863, being the day of the return of the foregoing writ, comes into the circuit court here, the said John Du Bois and Elias S. Lowe, by their attorneys aforesaid, and the marshal of the Maryland district aforesaid, to wit, Washington Bonifant, gentleman, to whom the foregoing writ in form aforesaid directed, makes the return thereof to the court here thus indorsed, to wit:

Summ'd Tome and Abbott, non est Shaw.

WASH. BONIFANT, *U. S. Mar'l.*

And the said Jacob Tome, Thomas M. Abbott, being called, come into the circuit court here, George H. Williams and George W. Dobbin, esquires, their attorneys, and the said Daniel Shure appears in the circuit court here by George H. Williams and George W.
5 Dobbin, esquires, his attorneys.

And thereupon the said John Du Bois and Elias S. Lowe pray that the said Jacob Tome, Thomas M. Abbott, and Daniel Shure may answer to the declaration of them, the said John Du Bois and Elias S. Tome, in the plea aforesaid, a judgment will be rendered against them by defendants.

And thereupon, on motion of the said Jacob Tome, Thomas M. Abbott, and Daniel Shure, by their attorneys aforesaid, it is ruled by the court here that the said John Du Bois and Elias S. Lowe give security for all costs and charges that the said Jacob Tome, Thomas M. Abbott, and Daniel Thure may be put to, in case the said John Du Bois and Elias S. Lowe shall be nonsuited or judgment be given against them in the plea aforesaid, or in default thereof that judgment of nonsuit by the court here will be entered against them.

Whereupon comes here into court, in his proper person, Peter Thompson, of the city of Baltimore, State of Maryland aforesaid, and who, by the court here, is considered good and sufficient, and undertakes for the said John Du Bois and Elias S. Lowe, that if the said John Du Bois and Elias S. Lowe, in the plea aforesaid, shall be nonsuited or judgment therein be given against them, then the said John Du Bois and Elias S. Lowe shall pay unto the said Jacob Tome, Thomas M. Abbott, and Daniel Shure, all such costs and charges by them about their defence in this part sustained, or shall be adjudged
6 unto the said Jacob Tome, Thomas M. Abbott, and Daniel Shure, by the court here, or that he, the said Peter Thompson, will do the same for them.

And afterwards, to wit, on the 25th day of September, in the year of our Lord 1863, the said Jacob Tome, Thomas M. Abbott, and Daniel Shure, by their said attorneys, file in court here the following plea, to wit:

In the circuit court of the United States for the fourth circuit, in and for the Maryland district.

JOHN DU BOIS and ELIAS S. LOWE
vs.
JACOB TOME, THOMAS M. ABBOTT *et al.*

And the said Jacob Tome, Thomas M. Abbott, and Daniel Shure, by George H. Williams, their attorney, come and defend the force and injury, when, &c., and say that they are not guilty of the said supposed trespasses above laid to their charge, or any part thereof, in manner and form as the said plaintiffs have above thereof complained against them. And of this they, the said Jacob Tome and Thomas M. Abbott, put themselves upon the country, &c.

GEO. H. WILLIAMS, *Att'y for Defendants.*

And the said John Du Bois and Elias S. Lowe doth the like.

Thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties
7 and their attorneys aforesaid, and by order of the court here thereon, is continued until the first Monday in November next.

At which said first Monday in November, in the year of our Lord

1863, comes again into the circuit court here the parties aforesaid, by their attorneys aforesaid.

Thereupon further process of and upon the premises aforesaid between the parties aforesaid, by consent of the said parties and their attorneys aforesaid, and by order of the court here thereon, is continued unto the first Monday in April next.

At which said first Monday in April, in the year of our Lord 1864, comes again into the circuit court here, the parties aforesaid, by their attorneys aforesaid.

Whereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties and their attorneys aforesaid, and by order of the court here thereon, is continued until the first Monday in November next.

At which said first Monday in November, in the year of our Lord 1864, comes again into the circuit court here the parties aforesaid, by their attorneys aforesaid.

Whereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties and their attorneys aforesaid, and by order of the court here thereon, is further continued until the first Monday in April next.

8 At which said first Monday in April, in the year of our Lord 1865, comes again into the circuit court here the parties aforesaid, by their attorneys aforesaid.

Thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties and their attorneys aforesaid, and by order of the court here thereon, is further continued until the first Monday in November next.

At which said first Monday in November, in the year of our Lord 1865, comes again into the circuit court here the parties aforesaid, by their attorneys aforesaid.

Whereupon, for trying the issue aforesaid, it is ordered by the court here that twenty-persons from the panel of petit jurors returned to the court here by the marshal of the Maryland district aforesaid, be drawn by ballot, and thereupon the twenty persons being so drawn by ballot, and written upon two lists, one of which said lists is delivered to the counsel for the respective parties; and the counsel for the each of the said parties having stricken out four persons from the said lists, the remaining twelve persons being called, come, to wit, Joshua Smith, Arthur Carlton, William Gibson, Malcolm W. Mearis, Charles Evans, Charles E. Cox, James Burnside, Dennis Scholl, William H. Derr, Henry Fritch, Thomas Boyd, and Wm. M. Watkins, who being empanelled and sworn to say the truth in the premises, upon their oath do say that the said Jacob Tome, Thomas M. Abbott,

9 and Daniel Shure are guilty of the premises in manner and form as the said John Du Bois and Elias S. Lowe have above complained against them, and they assess the damages of them, the said John Du Bois and Elias S. Lowe, by occasion of the premises, to the sum of five thousand five hundred and one dollars and eighty-eight cents.

Therefore it is considered by the court here, that the said John Du

Bois and Elias S. Lowe recover against the said Jacob Tome, Thomas M. Abbott, and Daniel Shure, as well the sum of twenty thousand dollars, the damages in the declaration of the said John Du Bois and Elias S. Lowe mentioned, as the sum of adjudged by the court unto the said John Du Bois and Elias S. Lowe, on their assent, for his costs and charges by them about their suit in this behalf expended, and the said Jacob Tome, Thomas M. Abbott, and Daniel Shure, in mercy, &c.

Memorandum.

Before the jurors aforesaid withdrew from the bar of the court here, the said Jacob Tome, Thomas M. Abbott, and Daniel Shure, by their attorneys aforesaid, filed in the court here the following bill of exceptions, and which was by the court here signed and sealed, and which is in form following, to wit:

In the circuit court of the United States in and for the district of Maryland.

DUBOIS & LOWE
vs.
TOME, SHURE *et al.*

10 The plaintiffs to maintain the issues joined in the above caue proved that on the 30th day of September, A. D. 1861, by reason of a freshet in the Susquehanna river, 2 booms at Williamsport, and 1 at Lockhaven, in the State of Pennsylvania, containing a large quantity each of logs for lumber, were swept down the said river, that telegrams were at once sent down the river to various places, and among others to Fort Deposit and Havre de Grace, to the postmasters at said places, requesting them to have the floating logs caught and saved for the owners before they got into the bay and should be lost; that under such notices defendants caught and saved a quantity thereof, and commenced to saw and convert into lumber the same, so soon as they could take them from said river; that a few days after said freshet the owners of said logs held a meeting at Williamsport, and appointed a committee of three persons, Weingartner, Barrows, and Bowman, with authority to go down the river and arrange with persons who had saved said logs, with full authority to sell the same; that in execution of such powers they came down the river, and were at the mill of defendants on the Tide Water canal, 7 miles above the town of Harve de Grace, where they saw some of the logs, and offered to sell them to defendants, but the parties could not agree as to the terms of sale; the visit of this committe to said mill was on or about the 7th or 8th of October, A. D. 1861, and all of the committee were then present; the offer was to sell all the logs between Safe Harbor Dam on the Susquehanna, to Havre de
11 Grace, which included the logs then in the defendants' possession, and that prior to said visit defendants had sawed some of said logs, and were engaged in such sawing when they came, and the committee prohibited all further sawing thereof; that at the time of said visit and prohibition they estimated the lumber then sawed

(there were conflicting estimates) at from 40 to 200 thousand feet; that they made several visits to def'ts mill, and on the last visit they went for the purpose of ascertaining and measuring the whole amount, and this was in the month of December, 1861; and in the judgment and by the measurement of the committee, there were 400 M. feet of sawed lumber, and 100 M. in logs; the plaintiffs further proved that defendants failing to agree with the committee as to the terms of purchase of said logs, they, the plaintiffs, bought all of said logs from Safe Harbor to H. de Grace from said committee, on the 26th day of October, 1861, and settled with them therefor; they further proved that on the day after the purchase by said plaintiffs they notified Tome, one of the defendants of said purchase, and demanded of said Tome payment of so much of said logs as had been sawed, and payment being refused they demanded possession of all the lumber sawed and unsawed in the def'ts possession, and prohibited the sawing of any more; the said Tome denied the ownership of said logs and lumber in said pl'ffs, alleging that they had not been scaled and
12 delivered to them; and that after said committee had scaled the logs and estimated the quantity of lumber as already stated, in December, 1861, plaintiffs made another application to Tome, but without success, referring them to Shure, a co-defendant, of whom they had made repeated demands, and received repeated refusals.

The defendants thereupon, to maintain the issue on their part joined, proved that after the receipt of the notices by telegraph, they commenced to save such of said logs as were being brought down by the freshet, and as they had been in the previous year the purchasers of logs lost in a similar manner by the owners in good faith, and with the full expectation they would in like manner be the purchasers of these, commenced to saw, and did convert into lumber the said logs as fast as they were recovered, and that they had directed the man at their saw-mill to keep an account of the same; that they had converted about 22 logs into lumber (the whole capacity of their said mill being an ability to saw into lumber 45 logs a day) when the said committee came to said mill, and objecting to the manner of keeping said account, gave directions as to the keeping of the same in a different manner, requiring a tally to be kept upon a board distinguishing the marks upon the said logs, and ascertaining separately the quantity sawed under each mark, and which said board was produced and proved to the jury; they further proved that of said logs, when
13 so sawed into lumber, they had sold three canal boat loads, on the 18th and 25th of October, A. D. 1861, and had received the money therefor, at the value of $11 per M., and that said board with said half day's sawing, and another small board containing about 20 logs and which had been lost in the subsequent burning of the mill, containing in all about 780 logs, was the whole amount of the logs so recovered and sawed, and that from the moment they heard of the sale of said logs by said committee to said pl'ffs, they had ceased either to catch or to saw said logs; that 5 logs sawed would make a thousand feet of lumber; that it was worth $3 per M to saw it, and $5 per M to save it; and that the value of said lumber in the market was the

price at which they sold as above stated; and on the re-examination of said committee while forgetting or refusing to be positive about directing such account to be kept by said board, they were quite positive in their recollections that on their said first visit to the mill of said defendants they had forbidden all sawing of said logs; and defendants proved also that when called on by said committee after they had made their final estimate and measurement of said lumber for an account of the logs so caught and manufactured into lumber, they expressed a willingness to furnish such account, and to pay therefor to said committee, for themselves or for the owners, but would not furnish an account for nor settle with said plaintiffs, whom they refused to know in the matter.

14 The pl'ffs also gave evidence that the said logs when sawed were worth from $13 to $16 per M. feet.

That thereupon the defendants prayed the court to instruct the jury as follows:

1. If the jury shall find that the logs in question were the property of the several parties shown by the evidence to have constituted Messrs. Weingardner, Barrows, and Bowman a committee to dispose of the same, and that the defendants took the said logs into their possession and sawed the same into boards without the consent of the said owners, then the said taking and sawing was a tortuous conversion of the said logs, for which the said defendants became responsible to the said original owners in trover, and the plaintiffs are not entitled to recover in this action, notwithstanding they shall also find that after the said conversion the said plaintiffs purchased all the said former owners' interest in said logs.

(Rejected.)

2. That if the jury shall find their verdict for the plaintiffs, the measure of damages is the value of the logs at the time and place of their conversion.

(Rejected, as embraced in court's instruction.)

3. If the jury shall find that the logs in question were saved by the def'ts from the freshet in the Suspuehanna, for the benefit of the owners when they should appear, and then shall further find that being perishable, they were sawed by the defendants also for

15 the benefit of whom it might concern, then the measure of damages will be value of the logs at the time and place they were so saved, or the value of the lumber, deducting therefrom the cost of saving and sawing.

(Rejected.)

If the jury find from the evidence that the logs were saved in conformity with the instructions of those who were the owners thereof at the time of the freshet, and that they or so many thereof as were saved were thereafter sawed into plank by the instructions of and with the sanction of the committee representing said owners, that then the jury, in estimating the value of said logs and lumber at the time of the demand and refusal thereof to plaintiffs, are to allow a reasonable sum as compensation for saving such logs and sawing the same into plank.

(Rejected.)

That if the jury shall find the facts as stated in the foregoing prayer, shall further find that upon the demand of plaintiffs for said plank and lumber, the said defendants did not absolutely refuse but qualified it by stating their readiness and willingness to account to those who were the owners at the time of such taking and sawing, then the plaintiffs are not entitled to recover.

(Rejected.)

But the court rejected each and all of said prayers, and gave
16 to the jury the following instructions:

Court's instructions.

If the jury shall find from the evidence in this case that the saw-logs and planks found by the witnesses at defendants' mill were saw-logs that had come down the river during the freshet of September, 1861, belonging to the owners represented by Mes'rs Weingardners, Barrows, and Bowman, or plank sawed from said logs, and that said logs and plank were sold by said committee to the plaintiffs in this case, and that subsequently to said purchase the plaintiffs demanded the same from the said defendants, and that defendants refused to give up the same to the pl'ffs, then the plaintiffs are entitled to a verdict for such sum as the jury may find the logs and plank to be worth at the time of such demand and refusal at the mill of defendants, with the interest from the time of such demand, after deducting whatever cost the jury may find the defendants incurred for the saving of the logs, and also the cost of sawing; if the jury shall further find that said saving and sawing were done on the request or by the sanction of the owners or their committee.

To the rejection of which said prayers and the granting of which said instructions the defendants excepted, and prayed the court to sign and seal this their bill of exceptions, and which is here done accordingly, this fifteenth day of November, A. D. 1865.

WILLIAM F. GILES. [SEAL.]

17 And now, here at this day, to wit, on the 25th day of November, in the year of our Lord 1865, the said Jacob Tome, Thomas M. Abbott, and Daniel Shure produced to the circuit court the writ of the United States of America, for the correcting of errors of and upon the premises, commanding the record and proceeding aforesaid, of the judgment aforesaid, so as aforesaid rendered, with all things concerning the same, to be transmitted to the Supreme Court of the United States, to be held at the city of Washington, on the first Monday in December next, which said writ of error is in the words and of the tenor following, to wit:

19 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court of the United States for the fourth circuit in and for the Maryland district, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said court before you, or

some of you, between John du Bois and Elias S. Lowe, plaintiffs, and Jacob Tome, Thomas M. Abbott and Daniel Shure, defendants, a manifest error hath happened, to the great damage of the said Jacob Tome, Thomas M. Abbott, and Daniel Shure, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday in December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein
20 to correct that error, what of right and according to the laws and custom of the United States ought to be done.

Witness the honorable S. P. Chase, Chief Justice of our Supreme Court, the first Monday in December, in the year of our Lord one thousand eight hundred and sixty-four.

Issued November 25, '65.

[SEAL.] JAS. W. CHEW, *Cl'k Circuit C't.*

21 In pursuance whereof, and according to the form and effect of the act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid, so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court accordingly.

Writ of error bond.

Know all men by these presents that we, Jacob Tome, Daniel Shure, and Thomas M. Abott, and Joseph J. Taylor and George H. Williams, all of the State of Maryland, are held and firmly bound unto John Dubois and Elias S. Lowe, of the State of Pennsylvania, or to their certain attorneys, executors, administrators, or assigns, in the full sum of eleven thousand dollars, to which payment well and truly to be made we bind ourselves, and every of us, one and every of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this twenty-fifth day of November, A. D. 1865.

Whereas the said John Dubois and Elias S. Lowe did recover a judgment in the circuit court of the United States in and for the district of Maryland, in a cause therein pending, in which they were the plaintiffs and the said Tome, Shure, and Abbott were defendants, on the fifteenth day of November instant, at and for the sum of fifty-five hundred and one dollars and eighty-eight cents
22 and costs; and whereas the said defendants have sued

out a writ of error on said judgment to the Supreme Court of the United States:

Now, the condition of the above obligation is such that if the above-bound Tome, Shure and Abbott shall not cause a transcript of the record and proceedings of the said judgment to be transmitted to the said the Supreme Court of the United States within the time prescribed by law, and prosecute the said writ with effect, and also satisfy and pay unto the said John Dubois and Elias S. Lowe, their executors, administrators, or assigns, in case the said judgment shall be affirmed, as well all and singular the debt, damages, and costs adjudged by the said circuit court as aforesaid, to be paid to the said plaintiffs in said judgment, as also all cost and damages that shall be awarded by the said the Supreme Court of the United States, then this bond to be and remain in full force and virtue, otherwise of no effect.

J. TOME. [SEAL.]
D. F. SHURE. [SEAL.]
TH. M. ABBOTT. [SEAL.]
JOS. JAS. TAYLOR. [SEAL.]
GEO. H. WILLIAMS. [SEAL.]

Signed, sealed, and delivered in the presence of—
Witness as to sig. of C. F. Shure & Th. M. Abbott:
CHS. B. HITCHCOCK.
Witness to J. Tome:
CHAS. H. HINES.
Witness to signature of Jos. Jas. Taylor & George H. Williams:
WM. H. DAWSON.

"Bond approved 15 Dec., 1865. WILLIAM F. GILES."

23 The United States of America, to John Dubois and Elias S. Lowe, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at the city of Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fourth circuit in and for the Maryland district, wherein Jacob Tome, Thomas M. Abbott, and Daniel Shure are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Jacob Tome, Thomas M. Abbott, and Daniel Shure as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness my hand and seal this day of fifteenth , in the year of our Lord one thousand eight hundred and sixty-five.

WILLIAM F. GILES. [SEAL.]

I acknowledge notice of the above citation.

L. M. REYNOLDS,
For Du Bois & Lowe.

24 In testimony that the aforegoing is a true copy taken from the record and proceedings of the circuit court aforesaid, I hereunto subscribe my name, and affix the seal of the said circuit court this fifteenth day of December, in the year of our Lord one thousand eight hundred and sixty-five.

[SEAL.] JAMES W. CHEW, *Clerk Circuit Court.*

IN THE SUPREME COURT OF THE UNITED STATES.

J. TOME ET AL., PLAINTIFFS IN ERROR,

VS.

DUBOIS & LOWE.

APPEAL FROM THE CIRCUIT COURT OF THE U. S. FOR THE DISTRICT OF MARYLAND.

Statement of Plaintiffs in Error.

This was an action of trover brought by Defendants in Error to recover the value of some logs which had drifted down the Susquehanna River, had been saved by Plaintiffs in Error, and, as it was alleged, had been tortiously converted. The narr contained but one count, and that in trover.

It was proved that by a freshet, on the 30th Sept., 1861, a large quantity of logs were swept down said river from Williamsport and Lockhaven in Pennsylvania. Telegrams were from thence despatched to places, among others to Port Deposit and Havre-de-Grace, asking that they might be saved before they got into the Chesapeake Bay and should be lost. Under such notices Plaintiffs in Error saved a quantity of the logs, and commenced to saw the same into lumber. The owners of the logs had a meeting in Pennsylvania and appointed a committee of three, (Printed Rec., p. 5,) with authority to go down the river and sell all the logs which had been saved. That said committee came to the mill of Plaintiffs in Error on or about 7th or 8th October, 1861, where they were then sawing some of said logs; and not agreeing upon the terms of sale, committee prohibited (about this there was conflicting evidence) all further sawing.

On 26th October, 1861, Defendants in Error bought all the logs, sawed or not, from the committee of owners, and on the day after made demand for the lumber and the logs; and their ownership was denied because the logs had not been scaled and delivered to them.

Plaintiffs in Error proved they had saved the logs, and as they had been the purchasers of all logs saved in the freshet of the preceding year, with like expectation and in good faith commenced to saw these into lumber as fast as they were recovered and directed an account to be kept. The committee (Rec., p. 6) objected to the manner of keeping this account, and directed how it should be kept; and so soon as Plaintiffs in Error heard of the sale to Defendants in Error they at once ceased to saw, and were will-

ing to account and settle with the committee for themselves and the owners for what they had sawed, and pay therefor, but not with the Defendants in Error as subsequent purchasers, and whom they refused to know in the matter.

Plaintiffs in Error then prayed the Court to instruct the Jury as set forth in the five prayers on printed Record, p. 7 and 8, and which are in substance as follows:

1st. That if they sawed said logs without the consent of the owners it was a tortious conversion, for which they were responsible to the then owners; and that Defendants in Error as subsequent purchasers could not sue for such tortious conversion.

2d. That the measure of damages was the value of the logs at the time and place of conversion.

3d. That if the logs were saved for the benefit of the owners when they should appear, and that being perishable they were sawed for the benefit of whom it might concern, then the measure of damages was their value at the time and place they were saved, or the value of the lumber less the cost of saving and sawing.

4th. That if the logs were saved in conformity with the instructions of the then owners, and were thereafter sawed into plank with the sanction or under the instructions of the then owners, then the jury in estimamating the value of the logs and lumber at the time of the demand by, and refusal to the Defendants in Error, are to allow a reasonable sum for the saving and sawing.

5th. That if they found not an absolute but a qualified refusal, and a willingness to account with those who were the true owners at the time of the taking and sawing, the Defendants in Error could not recover.

Each and all of which the Court rejected, and in lieu thereof gave the instruction which will be found on Record, p. 8.

Court's instructions.

If the jury shall find from the evidence in this case that the saw-logs and planks found by the witnesses at defendants' mill were saw-logs that

had come down the river during the freshet of September, 1861, belonging to the owners represented by Mes'rs Weingardners, Barrows, and Bowman, or plank sawed from said logs, and that said logs and plank were sold by said committee to the plaintiffs in this case, and that subsequently to said purchase the plaintiffs demanded the same from the said defendants, and that defendants refused to give up the same to the pl'ffs, then the plaintiffs are entitled to a verdict for such sum as the jury may find the logs and plank to be worth at the time of such demand and refusal at the mill of defendants, with the interest from the time of such demand, after deducting whatever cost the jury may find the defendants incurred for the saving of the logs, and also the cost of sawing; if the jury shall further find that said saving and sawing were done on the request or by the sanction of the owners or their committee.

The Plaintiffs in Error will contend—

1st. That if the sawing of the logs (which was a necessary part of their saving) was a tortious conversion, then such tort, or the right of action therefor was not assignable, and that subsequent purchasers of the logs could not sue for their tortious conversion previous to the purchase.

2 Saunder's Pld'g & Evidence, p. 1,144 and 1,153.
Gardner vs. Adams, 12 Wend., 297.
McGoon vs. Ankeny, 11 Illinois, 558.
Goodwin vs. Lloyd, 8 Porter, (Ala.,) 237.
Brown vs. Lipscomb, 9 " " 472.
Dunklin vs. Wilkins, 5 Ala., 199.
Young vs. Fergusson, 1 Littell, 298
1 Chitty Pleadings, p. 148.

The Supreme Court of Pennsylvania—31 Penn. Repts, p. 160—in the case of Overton vs. Williston, say this principle is beyond dispute.

2d. That the Court's instruction was erroneous, in that it permitted the assignee of a tort to recover, and also that it tended to confuse the jury by leaving to them to find or not a fact which was not disputed, viz: that at least the logs were saved under instructions. That Plaintiffs were not, at all events, trespassers ab initio; and that if Defendants in Error could not sue for so much of the logs as were converted previous to their purchase, there was no separation of the residue, or delivery by the former owners, for which trover would lie.

White vs. Wilkins, 5 Taunton, 176.
Shepley vs Davies, 5 " 622.

3d. The narr alleges that Plaintiffs were possessed on 1st August, 1861, and that Defendants tortiously converted on that day—the proof of Plaintiffs shows they acquired no title until 26th October, 1861, the day of their purchase.

4th. That being saved by request, there was an implied assumpsit to pay for the work and labor for so doing; and before an action would lie, a tender of a reasonable amount should have been made for the saving. That Defendants ought to have been allowed to have gone before the jury on the qualified refusal, and to have had a verdict under the fifth prayer.

GEO. H. WILLIAMS,
For Plaintiffs in Error.